IN THE HIGH COURT OF KERALA AT ERNAKULAM

PRESENT :

THE HONOURABLE MR. JUSTICE M.SASIDHARAN NAMBIAR

THURSDAY, THE 4TH JANUARY 2007 / 14TH POUSHA 1928

CRP.No. 1220 of 2003(G)

AGAINST THE ORDER DATED 10/12/2002 IN OS.357/94 IN IA.886/2002 of PRL.S.C.,THALASSERY

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REVN. PETITIONER: 1ST DEFENDANT

MAVULLATHIL ANANDAN, S/O.KUNHAMBU,
CHEMBALONDAVIDA HOUSE, PUTHUR AMSOM
CHENDAYAD DESOM, P.O.CHANDAYAD, THALASSERY.

BY ADV. SRI.T.A.RAMADASAN

RESPONDENTS: PLAINTIFFS AND DEFENDANTS 2 AND 3

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1. KANNAMPOLIYAN NANU, S/O.KUNHAPPU,
KOLLANKANDIYIL, PUTHUR AMSOM, CHANDAYAD
DESOM, THALASSERY.

2. PALAKKANDY KALLAN DEVI, W/O.NANU,
-DO-

3. MAVULLATHIL KUNHIKANNAN, S/O.KUNHAMBU,
PUTHEN PURAYIL HOUSE, -DO-

4. MAVULLATHIL RAVEENDRAN, S/O.KUNHAMBU,
MOTTAPARAMBATH HOUSE, -DO-

BY ADV. SRI.GRASHIOUS KURIAKOSE

THIS CIVIL REVISION PETITION HAVING BEEN FINALLY HEARD ON 04/01/2007, THE COURT ON THE SAME DAY PASSED THE FOLLOWING:

ORDER ON I.A.NO.172/03 IN crp 1220/03

DISMISSED

4/1/2007

SD/-M.SASIDHARAN NAMBIAR,JUDGE.

//True copy//

PA to Judge.

M.SASIDHARAN NAMBIAR,J.

C.R.P.NO.1220 OF 2003

Dated 4th January 2007

O R D E R

A compromise petition was filed signed by plaintiff, defendants, except one and their counsel. A compromise decree was passed in terms of the compromise. Whether the defendants, who did not sign the compromise petition, is entitled to file an application to set aside the compromise decree on the ground that he is not a signatory to the compromise alleging fraud? Whether the signature of the counsel for the party in a compromise petition is sufficient and whether it is mandatory that all the parties to sign the compromise petition? There the questions to be settled in the revision petition.

2. Respondents 1 and 2 are the plaintiffs. Petitioner and his brothers, respondents 3 and 4, are defendants. O.S.357/94 was filed before Sub court, Thalassery for fixation of boundaries. After Commissioner submitted a report and plan, objection was filed to the report. Thereafter a settlement was

arrived at between the parties. I.A.814/01 was filed on 7/3/2001. In that compromise petition signed by first plaintiff and defendants 3 and 4 and counsel appearing for plaintiffs and defendants, it was stated that the dispute was settled between the parties accepting the report and plan submitted by the Commissioner in the suit. A decree in terms of the compromise fixing the boundaries as demarcated by the Commissioner in the plan was sought. Accepting the compromise, learned Sub Judge passed a decree in terms of the compromise on 7/3/2001. Thereafter decree holders filed execution petition, to execute the compromise decree. While so, first defendant, the petitioner herein filed I.A.886/02, to set aside the compromise decree contending that he was not a party to the compromise and he was not aware of the compromise and during January 2001 he was totally bed ridden and hence could not contact his counsel and his brothers the other defendants used to contact the counsel and give instructions and he received notice in E.P.32/02 and then with the help of the neighbour he went through the notice and to his surprise found out that suit was decreed. When contacted his brothers disclosed that suit was decreed on the basis of a compromise and a petition filed before the court. It was

alleged that it was all done behind his back. It was also alleged that it seems that "other defendants had colluded with the plaintiffs and played fraud on the petitioner" and therefore compromise decree is not valid and binding on him and therefore it is to be set aside. Petition was filed, purporting to be under Order XXIII Rule 3 of Code of Civil Procedure. Respondents 1 and 2 filed objections to the petition. Learned Sub Judge under the impugned order dated 10/12/2002, dismissed the application. It is challenged in this revision petition filed under Section 115 of the Code of Civil Procedure. (hereinafter referred to as the Code).

3. Learned counsel appearing for petitioner and respondents 1 and 2 were heard.

4. Arguments of learned counsel appearing for petitioner was that in the compromise petition filed before the court petitioner did not affix his signature and only the other defendants signed the same and petitioner did not instruct or authorise his counsel to enter into a compromise or file a compromise petition and in such circumstances, it is clear that a fraud was played on the petitioner by other defendants, in collusion with plaintiffs and therefore the compromise

decree should be set aside. Arguments of learned counsel was that in the absence of specific authorisation to enter a compromise, the counsel is not authorised to enter into a compromise on behalf of petitioner and the compromise entered into was not for and on behalf of petitioner and therefore signature of the counsel in the compromise petition cannot be treated as a signature for the petitioner and hence compromise decree is to be set aside. Reliance was placed on the decision of a learned Single Judge of High Court of Allahabad in **Lokumal Topan Dass and another v. Allahabad Bank and others (AIR 1998 Allahabad 398),** and decision of the Apex court in **Gurpreet Singh v. Chatur Bhuj Goel (AIR 1988 SC 400) and Ramasrey v. Dy.Director Consolidation Dist. (1998 (6) SCC 480).** It was argued that on the facts it is clear that petitioner was not a party to the compromise and the decree was the result of fraud played on petitioner and therefore petition is to be dismissed.

5. Learned counsel appearing for respondents 1 and 2 argued that compromise decree was passed on 7/3/2001 and petition to set aside the decree could only be treated as a petition to review the decree and judgment and petition for review after lapse of more

than one year without a petition to condone the delay is not maintainable and for that reason alone, petition is liable to be dismissed. It was also argued that when examined as PW1, petitioner has no case that by the compromise decree he sustained any loss and in such circumstances, interest of justice does not warrant any interference, at the belated stage. It was further argued that evidence of petitioner conclusively prove that joint written statement was filed by all the defendants and petitioner entrusted his brother second defendant to instruct the counsel and contest the case and second defendant was giving instructions to the counsel and compromise was entered into between plaintiffs and all the defendants and as petitioner was not available to sign the compromise petition, he did not sign in the compromise petition and the counsel who appeared for all defendants signed it and for the failure of petitioner to sign alone the compromise decree cannot be set aside as the signature of the party contemplated under Order XXIII Rule 3 does not mean that signature of the counsel is insufficient and as declared by the Apex court in **Jineshwardas (dead) through L.Rs. & Ors, v. Jagrani & another (JT 2003**

(Suppl.2) SC 158) and Byram Pestonji Gariwala v. Union Bank of India and others (AIR 1991 SC 2234) signature of the counsel is sufficient and in such circumstances revision petition is only to be dismissed.

6. Order XXIII Rule 3 of the Code provides the procedure for compromise of suit. Under Rule 3 where it is proved to the satisfaction of the court that a suit has been adjusted wholly or in part by any lawful agreement or compromise in writing and signed by the parties or where the defendant satisfies the plaintiff in respect of the whole or any part of the subject matter of the suit, the court shall order such agreement compromise or satisfaction to be recorded and shall pass a decree in accordance therewith so far as it relates to the parties to the suit. The agreements or compromise "in writing and signed by the parties" was inserted in the Rule by amendment Act of 1976. Prior to the amendment there was no prohibition for an oral compromise. But because of the amendment and insertion for an agreement or compromise in writing and signed by the parties, a compromise if not in writing or if not signed by the parties is not enforceable or could be acted upon for recording compromise of the suit. The question whether

in a compromise in writing instead of signature of parties, signature of their counsel is sufficient or not was considered by the Apex court in **Byram Pestonji Gariwala's** case (supra). Apex court held,

> "37. We may, however, hasten to add that it will be prudent for counsel not to act on implied authority except when warranted by the exigency of circumstances demanding immediate adjustment of suit by agreement or compromise and the signature of the party cannot be obtained without undue delay. In these days of easier and quicker communication, such contingency may seldom arise. A wise and careful counsel will no doubt arm himself in advance with the necessary authority expressed in writing to meet all such contingencies in order that neither his authority nor integrity is ever doubted. This essential precaution will safeguard the personal reputation of counsel as well as uphold the prestige and dignity of the legal profession.

38. Considering the traditionally recognised role of counsel in the common law system, and the evil sought to be remedied by Parliament by the C.P.C (Amendment) Act, 1976, namely, attainment of certainty and expeditious disposal of cases by reducing the terms of compromise to writing signed by the parties, and allowing the compromise decree to comprehend even matters falling outside the subject matter of the suit, but relating to the parties, the legislature cannot, in the absence of express words to such effect, be presumed to have disallowed the parties to enter into a compromise by counsel in their cause or by itself duly authorised agents. Any such presumption would be inconsistent with the legislative object of attaining quick reduction of arrears in Court by elimination of uncertainties and enlargement of the scope of compromise.

39. To insist upon the party himself personally signing the agreement or compromise would often cause undue delay, loss and

inconvenience, especially in the case of non-resident persons. It has always been universally understood that a party can always act by his duly authorised representative. If a power of attorney holder can enter into an agreement or compromise on behalf of his principal, so can counsel, possessed of the requisite authorisation by vakalthnama, act on behalf of his client. Not to recognise such capacity is not only to cause much inconvenience and loss to the parties personally, but also to delay the progress of proceedings in court. If the legislature had intended to make such a fundamental change, even at the risk of delay, inconvenience and needless expenditure, it would have expressly so stated.

40. Accordingly, we are of the view that the words 'in writing and signed by the parties', inserted by the C.P.C.(Amendment) Act, 1976, must necessarily mean, to borrow the language of O.III, R.1, C.P.C:

> "Any appearance, application or act in or to any Court, required or authorised by law to be made or done by a party in such Court, may except where otherwise expressly provided by any law for the time being in force, be made or done by the party in person, or by his recognized agent, or by a pleader, appearing, applying or acting as the case may be, on his behalf:
>
> Provided that any such appearance shall, if the Court so directs, be made by the party in person".

This was subsequently considered by the Apex court in **Jineshwardas's case** (supra). Agreeing with the principle stated in **Byram Pestonji Gariwala's** case their Lordships held,

> "We are in respectful agreement with the above statement of law. Consequently it is not permissible for the appellant, to contend to the contrary. That apart we are also of the view that a judgment or decree passed as result of consensus arrived at

> before court, cannot always be said to be one passed on compromise or settlement and adjustment. It may, at times, be also a judgment on admission, as in this case."

In view of the position laid down by the Apex court it can only, be held that "in writing and signed by the parties" provided under Rule 3 of Order XXIII would mean if it is in writing and signed by the counsel for the parties, if it is proved that counsel is so authorised.

7. In **Gurpreet Singh v. Chatur Bhuj Goel (supra)** when a Letters Patent Appeal was heard in part by a Division Bench of the High Court of Punjab, an offer was made by the father of the appellant to pay to the respondent Rs.2,25,000/- in full and final settlement of the claim, if the respondent agrees to allowing the appeal and that on failure to pay the amount within the stipulated time, the appeal could be dismissed. The counsel appearing for the respondent accepted the offer. The Division Bench adjourned the appeal to another date on which the payment was to be made. On that day, respondent filed an application wherein he tried to

resile from the compromise. The Division Bench, in view of the fact that respondent was not prepared to abide by the proposed compromise, posted the appeal for hearing on merits. It was challenged before the Apex Court in the appeal by special leave. Their Lordships on the facts held that when the parties enter into a compromise during the hearing of a suit or proceedings the requirement to reduce the compromise in writing signed by the parties cannot be dispensed with and court must insist upon the parties to reduce the terms in writing and signed by the parties. That decision has no application where the compromise was reduced in writing and also signed by the parties except one of the defendants who filed joint written statement with other defendants who signed it and that too when their counsel also signed it.

8. Argument of learned counsel appearing for petitioner is that the decisions in Byram Pestonji Gariwala's case cannot be applied to the facts of the case as in that case, the fact that counsel was authorised to sign compromise was not disputed and evidence of RW2, the counsel who signed the compromise petition, establish that petitioner did not give any authorisation to sign the compromise petition or even

informed the counsel that there was a compromise and therefore signature of the counsel is insufficient. I cannot agree with the submission made. In **Jineshwardas's** case (supra) when second appeal came up for hearing there was a consensus expressed by both the counsel as is clear from the order recorded by the court. It reads;

> "Both the counsel are in agreement to settle the matter. The learned counsel for the respondents submits that respondents will pay an amount of Rs.25,000/- to the appellant within a period of one month, otherwise it will carry interest at the rate of 12% per annum from the date of today. On this agreed submission, this appeal is decided and judgment and decree passed by the court below is modified to this extent."

This order was challenged contending that it amounts to compromise as provided under Order XXIII Rule 3 and as the parties did not sign the compromise, the order is to be reviewed. Following the decision in **Byram Pestonji Gariwala's** case their Lordships held that a judgment

and decree were passed as a result of consensus arrived at before court. It is the case of the petitioner himself that he authorised his brother second defendant to instruct their counsel in contesting the suit. The defence, for all the defendants who are brothers, was common. The counsel was also common. The compromise was signed by the other two defendants and their common counsel. The compromise petition was accepted by the court and the decree in terms of the compromise was passed on 7/3/2001. Even after the decree and petitioner recovered from the illness, he did not contact either the counsel or the brothers to find out the fate or progress of the case. It is not the conduct expected of an ordinary prudent man, if there was no settlement of the case.

9. It was vehemently argued by Adv.Sri.T.A.Ramdas that as petitioner did not authorise the counsel to file a compromise petition, signature of the counsel cannot be a substitute for the signature of the party as contemplated under Rule 3 of Order XXIII. First of all on the facts it is clear that all the defendants engaged a common counsel and all of them filed a joint written statement. One of the defendants, which even according to petitioner, second defendant, was instructing the

counsel. Second defendant along with third defendant signed the compromise petition. Their counsel also signed it. The signature of the counsel cannot be taken as a signature for defendants 2 and 3 alone for the reason that first defendant did not sign it. It was argued that vakalath executed by petitioner did not authorise RW2, the counsel to sign in the compromise petition for petitioner and hence the signature of the counsel is only as a counsel and not a signature of the party. Rule 27 of Civil Rule of Practice provides that every vakalath shall unless otherwise permitted by court shall be in Form No.12. Vakalath provided under Form 12 authorise the counsel to appear for the party in the suit to conduct and prosecute or defend the same. Argument of learned counsel was that as it did not authorise the counsel to enter on a compromise, the signature of the counsel cannot be made use of as a signature of the petitioner. The vakalath filed by the defendants in favour of RW2 was called for from the trial court. On verification it is seen that by executing the joint vakalath, all the defendants including petitioner did authorise their counsel to compromise to the court. It was argued by Adv.Sri.Ramadas that it was only an authorisation to

file petition reporting compromise arrived at by the defendants and not an authorisation for the counsel to enter a compromise. When RW2 was appointed their counsel by executing a vakalath in his favour authorising to appear in the suit and to defend the suit, no separate authorisation, as such to file a petition in the suit on behalf of the defendants, including a petition to compromise was necessary. On the facts of the case all the defendants jointly authorised RW2 to defend their case in the suit. Second defendant was authorised to give instructions to RW2. Defendants 2 and 3 and first plaintiff talked and settled the dispute in the presence of the counsel. First plaintiff and defendants 2 and 3 and counsel for both parties signed the compromise petition. Second plaintiff, the wife of first plaintiff and first defendant who were not available at that time did not sign. The signature of the counsel in the compromise petition could be treated as signature of the first defendant, in the circumstances of the case. Rule 3 contemplates a compromise or agreement in writing. The written agreement settling the dispute submitted to the court was signed by the parties. It cannot be said that for want of the signature of first defendant, it is not

signed by the parties. A counsel possessed of required vakalath to act on behalf of petitioner, his client is competent to sign the compromise petition for the client. Hence even though, petitioner personally did not sign in the compromise petition, the signature of RW2 the counsel is the signature for petitioner also and hence the compromise petition accepted by the court is a petition signed by the parties.

10. Evidence of petitioner as PW1 establish that there was only a common case for the defendants, who are all brothers. They engaged RW2 as their counsel. Joint written statement was filed. Petitioner admitted that he had authorised the second defendant to contest the case. Second defendant was instructing the counsel. Compromise petition was signed by all the defendants except petitioner who was at that time not available to affix his signature. Even according to petitioner he was laid up and was hospitalised. On behalf of the defendants their counsel RW2 signed in the compromise petition. In such circumstances, for the failure of petitioner to affix his signature above in the compromise petition, it cannot be said that signature of the counsel was not for the petitioner as argued by the learned counsel.

11. Learned counsel appearing for petitioner then argued that in the objection filed by plaintiffs it was contended that at the time when compromise was entered into son of the petitioner was present and when RW2 the counsel was examined it was denied by the counsel and therefore case set up by the plaintiffs that there was a compromise with petitioner also is to be rejected. On the facts, that submission cannot be accepted. What was contended in the objection filed by plaintiffs was that there was a compromise talk wherein the counsel and parties participated. It was also stated in the objection that at that time son of petitioner was also present and after the talk a compromise petition was written by the junior of the counsel appearing for defendants and signature of the parties were affixed. When the counsel was examined as RW2, he was not cross examined on these aspects. The only question put to the counsel at the time of cross examination was whether son of petitioner was present in court at the time when compromise petition was signed. First of all in the objection there was no such case for the plaintiffs. There was no case that compromise petition was signed in court. Objection does not reveal that when the compromise petition was filed in court, son of

petitioner was present. What was contended in the objection was only that when compromise talk was in progress, son of petitioner was present. That aspect was not asked to RW2 in cross examination. Hence I cannot agree with the argument that because of the evidence of RW2 case of plaintiffs is to be rejected.

12. Rule 3A of Order XXIII expressly provides that no suit shall lie to set aside a decree on the ground that the compromise on which, the decree is based was not lawful. Sub section 3 of Section 96 of the Code provides that no appeal shall lie from a decree passed by the court, with the consent of the parties. Hence remedy of the party is only to approach the court to file an application to set aside the compromise decree. Order XXIII Rule 3 does not provide such an application. The application could only be an application for review as provided under Order XLII Rule 1 or an application to set aside the decree invoking the inherent powers provided under Section 151 of the Code. In both the cases the application is to be filed within a reasonable time. On the facts it cannot be said that petitioner filed application within the reasonable period.

13. As rightly pointed out by the learned counsel

appearing for respondents, it is clear from the evidence of petitioner that he is not really aggrieved by the compromise and he is fighting for second defendant who was present even when petitioner was examined in court. When petitioner was specifically asked whether by the compromise decree, he has lost any of his property, petitioner answered in the negative. Even in chief examination when he was asked whether any objection to the commissioner's report was filed the answer was in the negative, even though in the application filed before the court what was contended by petitioner was that he had filed objection to the report of the Commissioner. The conduct establish that compromise was entered into by all the brothers including petitioner and though petitioner did not sign in the compromise petition, his counsel had signed on his behalf in the compromise petition. Argument of learned counsel appearing for petitioner was that, as signature of the counsel figures in the compromise petition on the left side and signature of the parties on the right side, it cannot be considered that the signature of the counsel was for and on behalf of the petitioner who did not sign the compromise petition. Counsel appearing for petitioner had also signed on the left side of the

compromise petition and therefore much relevance cannot be attributed on whether the signature is on the left side of the petition or right side of the petition. On appreciating the entire facts, I find no illegality or irregularity in the impugned order passed by the learned Sub Judge warranting interference in exercise of the revisional powers of this court.

Petition dismissed.

M.SASIDHARAN NAMBIAR,
JUDGE.

uj.

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M.SASIDHARAN NAMBIAR,J.

ORDER

C.R.P.No.1220 OF 2003

4th January 2007

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